



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## THE COMMODITIES CLAUSES: ARE THEY ORDINANCES OF PROPERTY, OR REGULATIONS OF COMMERCE?

It would be difficult to exaggerate the importance of the constitutional questions suggested by the amendment to the Interstate Commerce Act, known as the Commodities Clauses. For the first time in our history, Congress has prohibited transportation by reason of the ownership of the commodities to be transported. After eliminating the portions of the enactment which the Supreme Court has deleted,<sup>1</sup> this residuum is projected—that railroad corporations may not transport among the States articles belonging to them at the time of such transportation. In construing the present statute, the Court has industriously reserved for further consideration important constitutional aspects of the power of Congress over the subject-matter. Meanwhile, propositions have been made in Congress for more definite legislation, thus invoking the full extent of legislative claim to eradicate the dual relation of producer and transporter. Therefore the juristic elements which enter into the final analysis of this novel assertion of national power form a subject of immediate interest.

Plainly appropriate methods for preventing favoritism by the common carrier for his own freight may be conceded—such as provisions of statute for the inspection of the handling of shipments, and for summary legal remedies to secure equality in forwarding—real regulations of commerce. But the general claim of power outlined for congressional action involves the entire dissociation of freight ownership from its transportation among the States. Though this class of enactments may sound as prescriptions merely affecting transportation, they require, or at least may require, a change of title to the commodities before transportation is procurable. This requirement is not in accordance with the historical conditions which existed at the time of the formation of the government. Examination discloses that most of the water carriage of that period was conducted by owners of ships, common carriers, also trading and transporting on their own account. If those contemporary conditions reflect the nature of the powers conferred through the Convention, it would seem

---

<sup>1</sup>U. S. *ex rel.* Atty. Genl. *v.* Delaware & Hudson Co. (1909) 213 U. S. 366. See the trenchant article in 9 COLUMBIA LAW REVIEW 523 (June).

that the present scheme of functional division was not contemplated. However, the ultimate test imposed upon this legislation is its conformity with the scope and meaning attributable to the power to regulate commerce. It cannot be assumed that regulation implies uncontrolled domination. But like other powers under our system, its significance will be sought in the structure of the federal organization, and in the historical incidents surrounding the origin and development of the commerce power. Most definitely speaking, the power to regulate interstate commerce is bounded by the limitations of federal power, whether those limitations be expressed as such, or be included in the powers not conferred on the general government. This results from the general principle of construing a written instrument as an entirety.

ENACTMENTS WHICH AFFECT RIGHTS OF PROPERTY ARE NOT REGULATIONS OF COMMERCE.

The presentation of this question is somewhat embarrassed by the infirmity inseparable from any document organizing a federal government. Such instrument can in the nature of things merely express the powers of the general authority, leaving the non-ceded attributes of the several States in a negative or unexpressed condition. This false perspective leads to a perverted enhancement of the positive position of the national government, and to an obscuring of the passive powers only generally reserved to the States. Through this process, the power to regulate commerce has become maximized over an undue proportion of the orbit of public affairs. Our angle of constitutional vision may be redressed by connoting the nature of those silent powers of government left in the undisturbed possession of the States. No part of this domain of State authority is more influential in the construction of the Constitution than the control over rights of property—the legal dominion over estates, real or personal, individual or corporate—the exclusive authority over titles and tenures, with all their incidents and relations.

As the Constitution was adopted, the word "property" does not appear among its provisions, except in reference to "the property of the United States"—for the very simple reason that the federal organization was not intended to have any governmental concern with that main subject-matter; patents, copyrights and bankruptcy being exceptions specifically expressed. The general

field of policy in reference to property being left to the sole control of the several States, there would not have been any propriety in formally subtracting from federal authority something which it never possessed. But it happened that these domestic rights were so jealously fostered that the amenders of the proposed Constitution submitted for adoption, insisted upon "making assurance doubly sure" and secured the Fifth Amendment—prohibiting the deprivation of life, liberty, or property, without due process of law. This course was pursued despite the advice of Hamilton, whose position was more logical than that of the amenders: The general government is not given jurisdiction over property rights. By attempting to define the absence of a power, you may give color to some contrary conclusion.<sup>2</sup> As surmised, the Amendment has given rise to some misapprehension—its phraseology leading to an impression that Congress possesses some qualified power over rules of property, that it may act thereon if it stops short of deprivation. But in truth the broad separation of powers still remains unaffected by this effort to emphasize it.

Practically all the fabric of property and its institutes remain withheld from dominion by Congress. The purport of this reservation would be more correctly apprehended if this faculty were affirmatively inscribed in the Constitution as a function of the States. But in whatever form it may be couched or left unexpressed, it would debar Congress from legislating upon the creation or dislocation of any right of property, whether its legislation does or does not extend to deprivation. Whether it is confiscation, or falls short of taking property without due process, it is legislation upon a subject-matter whose ordainment is the exclusive province of the States. The ascertainment of the legitimate scope of the power to regulate commerce should be aided by the delineation of this State power. If federal legislation trespasses upon this State territory, we have a sure indication that it is not a true regulation of commerce. *E converso*, the same rule would apply to State legislation purporting to be merely a rule of property but being really an ordinance of interstate commerce. As we are dealing with independent powers with separable functions, the whole problem consists in tracing their boundaries, or rather in learning whether Congress has correctly traced them.

The fact that the property conditions were created by the

---

<sup>2</sup>The Federalist (Dawson's Ed.), 599.

States before Congress enacted the Commodities Clauses should not of itself have an effective legal bearing on the validity of the latter. If such enactments were invalid, the vice would be existent even if they were merely prospective in their operation. This conclusion should follow from their trespass upon the territory of the plenary State power to ordain property rights. The scope of that power was so extensive that unless restrained by their own constitutions or the federal contract clause, the State legislatures could formerly have disregarded or annulled rights of property. That the protection of property from deprivation even by the States is now specifically placed under the guardianship of the federal judiciary emphasizes the legal compulsion to avoid any federal infringement upon the entire field of positive State power over property rights. The bearing of this extensive common law authority of the States upon the several phases of the legislation at bar will be deduced below.

THE DOCUMENTARY HISTORY OF THE CONSTITUTION INDICATES THAT THE PROHIBITION OF COMMERCE IS NOT INCLUDED IN THE POWER TO REGULATE COMMERCE.

This conclusion is derived from the continuous discrimination between regulation and prohibition—a distinction maintained both verbally and substantially.

During the Confederation all commercial powers resided in the States severally. No interstate arrangements affected this fundamental condition. The citizens of each State who might migrate into another State became subject to the same commercial "impositions and restrictions" as the inhabitants of their adopted State.<sup>3</sup> Each State could exclude the products of another State, or require them to be brought in ships sailing under the importing State's flag. On the lines of the colonial system these commercial powers were highly prized. This feeling was reflected in the provision of the Articles protecting this State right—"to prohibit the importation or exportation of any goods or commodities whatsoever"—from infringement by the exercise of the treaty power of the Confederation.<sup>4</sup> When the Confederation was entrusted with control over a species of commerce, it is indicated by the power given—"of regulating the trade with the Indians."<sup>4</sup> It thus appears that the broader power over the sub-

---

<sup>3</sup>Articles of Confederation, Art. IV.

<sup>4</sup>*Ibid.*, Art. IX.

ject-matter belonging to the States was expressed by authority "to prohibit": the more limited power conferred on the general government was "to regulate."

This substantial difference is maintained during the various proceedings taken to amend the Articles—so that it could not be inferred that there was any intention to transfer any power of prohibition to the Congress of the Confederation. Its committee (including Monroe, King and Johnson) reported on October 23rd, 1786, in favor of this amendment to Article IX:

"That Congress regulate trade among the States and with foreign governments."

"Also that the legislative power of the several States shall not be restrained from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

These resolutions would be contradictory, upon the theory of the identity of the powers of regulation and prohibition. They are reconcilable upon the ground that the statesmen of that day differentiated regulation from prohibition. They even conceived that the power of Congress to regulate interstate trade could be dependent upon its sufferance or prohibition, by the States.

This was the situation with which the Constitutional Convention dealt. The absolute State power over commerce was to be eliminated. It was not enough that interstate tariffs were abolished. But to provide against relapse into commercial particularism in the guise of local inspection laws, or tonnage dues, these topics were specially subjected to congressional revision. Thereafter, neither through interstate taxation, nor through interstate navigation laws, could any State prohibit commerce with another State. As this power of obstruction or prohibition within the Union was contrary to the spirit of the new government, such power was not transferred to the federal government. On the contrary, any such inference was repelled by specific limitations on the power to regulate commerce among the States, as seems fairly deducible from the following considerations.

In the contemplation of the framers of the Constitution, the subject of commerce was naturally identified with the navigation system. In this connection the whole concept of prohibition or obstruction of commerce among the States was carefully eradicated. In section 9 of the First Article, it is provided: "Nor shall Vessels bound to or from one State be obliged to enter, clear or pay duties in another." This requirement for the freedom of passage among the ports of the several States, for the instru-

mentalities of commerce employed at that time, indicates that the power of prohibition of interstate commerce was obliterated—that it was not intended to be included in the regulative power. Moreover, it will appear that there is a radical ground for not attributing a prohibitory power to the new régime—it lies in the inevitable encroachment upon the legal incidents of property which must ensue from the exercise of any form of prohibition of commerce. The *Lottery Case*<sup>5</sup> is *sui generis*. It really rests upon the theory that lottery tickets are not the subject-matter of commerce, are not property in its interstate aspect. It may, however, be suggested that their outlawry as subject-matter of federal commerce would leave the general government without jurisdiction over their transportation. But the Court did not deem it anomalous to respond that there was no prohibition against federal action! The case should not be taken as a justification for the prohibition of interstate commerce in any conceded species of property. The power to enforce an embargo against commerce with foreign nations is an incident of the inherent national powers of the general government, indeed it may be deemed an aspect of the war power in its broader sense of international hostilities. In this connection it may be noted that the power over interstate commerce was regarded as supplemental to the power over foreign commerce—as a means of preventing the States from obstructing the national policy concerning commerce with foreign nations by interstate regulations. Therefore, their verbal nexus does not imply identity in the nature of the two powers.<sup>6</sup>

THE POWER TO REGULATE IS NOT A POWER TO INSTITUTE AND ESTABLISH COMMERCE; NOR TO ORGANIZE IT UPON A METAPHYSICAL THEORY.

The line of legislation at bar has been regarded above in its prohibitory aspects, inasmuch as it is cast in that form. But in reality it is an attempt to found a system of interstate commerce upon certain ethical theories. As stated, it does not accept the situation created by the contiguity of the carriers' and the shippers' commodities, and compel equal facilities for their transportation. But it declares that the carriers' property shall not enter into the body of commerce, upon the doctrine that it might thereafter create a situation which would become the subject of regulation to prevent its preferential treatment. This is an ordinance

---

<sup>5</sup>(1903) 188 U. S. 321.

<sup>6</sup>The Federalist (Dawson's Ed.), 292.

for the origination of a new species of commerce and upon a metaphysical theory of congressional powers.

To repel this latitudinarian conception, we find in the Constitution several indications that the framers differentiated the power to ordain or create from the power to regulate. Congress is given power "to coin money, regulate the value thereof"<sup>7</sup>—furnishing the analogy of a principal and accessory power and placing regulation in the latter category. It is empowered "to make rules for the government and regulation of the land and naval forces."<sup>8</sup> Here we find two functions of control indicated, and regulation is the subsidiary form. In the light of this language, would not the power to govern in lieu of the power to regulate commerce, have given Congress more latitude? Then we find the power "to establish post offices"—presenting the phraseology appropriate for the primary action intended in reference to that institution. But what would have been thought of a power to establish commerce among the several States? Yet that is the real purport of the legislation at bar—the establishment of a new basis of commerce upon a new principle of selection through the process of prohibition. Unless we are willing to accept an unlimited outlook for the regulative power, it must act upon more concrete lines—must regulate commerce, not the formation of commerce.

THE LOGICAL APPLICATIONS OF THE CONGRESSIONAL THEORY OF THE COMMERCE POWER REPEL ITS CONSTITUTIONALITY.

The legislation which would be justified upon the theory of the Commodities Clauses involves far-reaching consequences in fact and in jurisprudence.

The same reasoning invoked in prohibiting corporations from carrying their own property applies to excluding the property of their directors or stockholders from facilities of transportation. If the prevention of possible discrimination legally justified the enactment at bar, the power may properly extend to partnerships in which stockholders are interested; and it would be almost impossible to affix the logical limit to such exclusion from the channels of commerce, if the potency asserted be conceded to be within the legislative power. Such incongruities must be accepted as the legal consequences of endeavoring to inject psychological considerations into the constitution of commerce.

---

<sup>7</sup>Const., Art. I, sec. 8.

<sup>8</sup>*Ibid.*

Individual carriers could be prohibited from mining coal upon their own lands and transporting it upon their own railways, tramways, or carts, into another State. This deduction is the necessary result of the fact that the commerce clause does not refer particularly to corporations, but includes also individuals in its operation. Indeed the word corporations is not found in the Constitution, and the commerce clause operated primarily upon individuals. In recent years we have naturally identified the conduct of interstate commerce with corporate action. But individuals were common carriers before railroads existed, and are just as likely to discriminate in their own favor as corporations. Therefore, if we are to form a true estimate of the extent of the congressional power claimed, we should dissociate the corporate idea from the interstate commerce idea. We may then realize that the same measure of power claimed over corporations engaged in such business applies to individuals.

Along these lines, Congress could seek to prevent discriminations in freight charges by prohibiting railroad corporations from accepting more than some fixed amount of freight from any corporation or individual. This would be a prohibitory method in avoidance of discrimination in favor of large shippers—by abolishing the large shippers. But it would not be less legally objectionable than the abolition of the shipments at bar by transportation companies.

THE TEST OF EACH OF THE COMMODITY CLAUSES UPON THESE PREMISES DOES NOT SUSTAIN ITS CONSTITUTIONALITY.

The requirement that railroad corporations shall not transport commodities owned by them is not a regulation of commerce, because it is an institute of property. It deprives the corporations in question of their chosen markets, and compels them to sell their property at the mines, or in markets practically chosen for them by the statute. If the right to sell is an incident of property, and that right involves the liberty of selection of the time and place of sale, then a property right is infringed by this enactment. If the Act of Congress does not in this respect constitute confiscation or deprivation of property, it is the deprivation of a right of property. In any event, it is legislation upon the subject-matter of property right, and therefore is not a regulation of commerce.

Besides its bearing upon these corporations as owners of commodities, its abstraction of business from the railroads is an

infringement upon the property right of user, the right to revenue. Again it may be said that such cleavage of a railroad corporation's earnings may still leave the company a reasonable return. While States may by their legislation so reduce the revenues of public utility corporations, Congress has not the power to cut down their earnings, to deprive them of a branch of their business, an element of their carriage. Such legislation is not a regulation of commerce, but an erosion of property right. The Supreme Court has not yet decided that Congress has the power, through a commission or otherwise, to fix the prices of transportation.

Many regulations of commerce, operating internally, may incidentally affect the value of the transportation company's property—the long and short haul clause may be an illustration in point. But the legislation at bar is not of that character: it operates directly upon substantial sources of railroad business. The measures which may be adopted by the corporations to countervail such legislation have no present bearing on the legal situation. *Pro hac*, Congress deals with property rights by directing the corporation to cease from transacting certain business.

Further legislative requirements contemplate the prohibition of transportation of commodities owned by a company in which the transporting company is a stockholder. The economic system of production now prevailing would be attacked by such enactments. The States have declared that the production of coal and other commodities is promoted if the producing agency be identified in interest, through stockholding, with the transporting agency. Can Congress change this system of production by refusing transportation to products mined by the company in which the railroad is a minority or majority stockholder? This trespass upon the legal rights of production is certainly beyond the province of control of transportation. Upon the foregoing, it would appear that there is no species of prohibition of commerce which does not infringe some property right. A potent inducement is thus presented for not construing the power to regulate as inclusive of power to prohibit.

The federal legislators must deal with the property conditions which the States have created or may create, accepting them as they stand. Once Congress reaches out to conditions existing beyond the body of commerce, its legal difficulties begin. Congress cannot impinge upon the State *imperium* over property rights, or over the legal conditions of production. Such enactments really

amount to legislative evasions of the duty to regulate commerce—in the constitutional meaning of regulation—by the legal administration of commerce in the concrete.

The treatment of the ownership of goods transported as an element of regulation was a conception foreign to the minds of the framers of the Constitution. As such conception involves the inclusion of control over property rights, it is logically alien to regulation of commerce. By assigning *any* interference with the freedom of markets for property as the boundary between the interstate commerce power and the property power, the harmonious action of both powers is the necessary resultant. No trespass upon such property rights is admissible upon the theory that commerce may be ultimately benefited. Such a theory would render the State powers mere implements for the furtherance of federal economic theory and nullify the division of our governmental powers.

EDWARD L. ANDREWS.

NEW YORK.